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**U.S. District Court
DISTRICT OF ARIZONA (Phoenix Division)
CIVIL DOCKET FOR CASE #: 2:11-cv-00333-MEA
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VIP Products LLC v. Bradley Caldwell Incorporated et al
Assigned to: Magistrate Judge Mark E Aspey
Cause: 15:1125 Trademark Infringement (Lanham Act)

Date Filed: 02/18/2011
Jury Demand: Plaintiff
Nature of Suit: 840 Trademark
Jurisdiction: Federal Question

Plaintiff

VIP Products LLC
an Arizona limited liability company

Trademark #
1,558,243

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

VIP Products, LLC, an Arizona limited
liability company,

Plaintiff,

v.

Bradley Caldwell, Inc. a Pennsylvania
corporation, **Lone Star Pet Supply GP,
L.L.C.**, a Texas limited liability company,

Defendants.

Case No.

COMPLAINT

(Federal Trademark Infringement;
Lanham Act Unfair Competition;
Arizona Common Law Unfair
Competition)

Trial By Jury Demanded

Plaintiff, VIP Products, LLC ("Plaintiff" or "VIP"), by and through its undersigned counsel, Mariscal, Weeks, McIntyre & Friedlander, P.A., for its complaint against Defendants Bradley Caldwell, Inc. and Lone Star Pet Supply, GP, L.L.C. (collectively, "Defendants"), hereby alleges and states as follows:

I.

THE PARTIES

1. VIP is an Arizona limited liability company with its principal place of business at 16515 S. 40th Street, Suite 121, Phoenix, Arizona 85048.

1 8. VIP sells several lines of dog toys, including the "TUFFY"[®] line (durable
2 sewn/soft toys), the "MIGHTY"[®] line (durable toys made of a different material than the
3 TUFFY[®] line), the "SILLY SQUEAKERS"[®] line (vinyl squeaky novelty dog toys) and the
4 TUFFY[®] branded "RUGGED RUBBER"[®] co-branded line (hard rubber dog toys).

5 9. In March of 2008 VIP acquired by assignment all rights, title and interest in the
6 federally registered TUFFY[®] trademark, U.S. Reg. No. 1,558,243, for pet toys in
7 International Class 28. This mark has been registered with the United States Patent and
8 Trademark Office since September 26, 1989.

9 10. Since the date of assignment, VIP has used the federally registered TUFFY[®]
10 mark in commerce continually in the United States in connection with pet toys.

11 11. Defendants, and each of them, without the consent of VIP, are using in
12 commerce VIP's registered TUFFY[®] mark, or reproductions, counterfeits, copies or colorable
13 imitations of VIP's registered TUFFY[®] mark, in connection with the sale, offering for sale,
14 distribution or advertizing of pet toys that are not VIP's TUFFY[®] dog toys but rather are
15 competing pet toys produced and distributed by VIP's competitors, including pet toys
16 manufactured by The Kong Company, LLC ("Kong"). Such use is likely to cause confusion
17 or mistake or to deceive and constitutes infringement of VIP's registered TUFFY[®] mark for
18 which Defendants, and each of them, are liable pursuant to 15 U.S.C. § 1114(1)(a).

19 12. Some or all of the violations, unlawful uses and unlawful actions alleged herein
20 involved the use of a counterfeit mark, within the meaning of 15 U.S.C. § 1116(d)(1)(B) and
21 § 1127, and/or counterfeit goods.

22 13. VIP has not granted a license to, or otherwise authorized, Kong or others to use
23 the TUFFY[®] mark on or in connection with any products that are not marketed by VIP.

24 14. An example of Defendant Lone Star Pet's Internet advertising of competing
25 toys using a reproduction, counterfeit, copy or colorable imitation of VIP's registered
26 TUFFY[®] mark is attached as Exhibit A.

1 15. An example of Defendant Bradley Caldwell advertising competing pet toys
2 using a reproduction, counterfeit, copy or colorable imitation of VIP's registered TUFFY®
3 mark is attached as Exhibit B.

4 16. All of the acts and events alleged herein occurred in interstate commerce and
5 affected interstate commerce.

6 17. Upon information and belief, Defendants' unauthorized use of the TUFFY®
7 mark, or reproductions, counterfeits, copies or colorable imitations thereof, is intended to
8 trade off of the goodwill of VIP's TUFFY® trademark.

9 18. Defendants' unauthorized use of VIP's TUFFY® mark, or any reproduction,
10 counterfeit, copy or colorable imitation of VIP's TUFFY® mark, in the manner described
11 above:

12 (a) has caused, is causing and is likely to cause confusion or mistake, or to
13 deceive customers and potential customers of the parties, as to the origin,
14 sponsorship, or approval of Defendants' products, services and
15 commercial activity, or as to some affiliation, connection, or association
16 of Defendants (or Defendants' products or services) with VIP or VIP's
17 products;

18 (b) is false and misleading and a misrepresentation of fact, made in
19 commercial advertising or promotion, of the nature, characteristics and
20 qualities of Defendants' products, services and commercial activities
21 and/or of VIP's TUFFY® line of dog toys.

22 (c) enables Defendants to trade off and receive the benefit of the goodwill
23 VIP has built up at great labor and expense over many years, and to gain
24 acceptance for Defendants' products and services not solely on their own
25 merits, but on the reputation and goodwill of VIP's TUFFY® mark, and
26 their products and services;

1 (d) unjustly enriches Defendants; and

2 (e) unlawfully removes from Plaintiff the ability to control the nature and
3 quality of products and services provided under VIP's TUFFY® mark and
4 places the goodwill and valuable reputation of VIP in the hands of
5 Defendants, over which VIP has no control.

6 19. VIP has been damaged and continues to be damaged by Defendants'
7 unauthorized use of the mark and trade name TUFFY®, or of reproductions, counterfeits,
8 copies or colorable imitations thereof, in the manner described above. Defendants, and each
9 of them, have profited and been unjustly enriched by such use. At a minimum, VIP is entitled
10 to recover Defendants' profits and damages sustained by VIP, enhanced according to the
11 circumstances of the case, together with the costs of this action pursuant to 15 U.S.C. §
12 1117(a).

13 20. Unless the acts of Defendants described herein are restrained by this Court, they
14 will continue to cause irreparable injury to VIP and to the public, for which there is no
15 adequate remedy at law. At a minimum, VIP is entitled, pursuant to 15 U.S.C. § 1116(a), to
16 an injunction preventing Defendants, each of them and all persons in active concert or
17 participation with them, from continuing the unlawful acts alleged herein and from doing any
18 act or thing likely to mislead, confuse or deceive others as to VIP's sponsorship, connection
19 or approval of Defendants' products, services or commercial activity or as to the origin,
20 nature, characteristics and qualities of Defendants' products or services; directing them to
21 perform corrective advertising to undo the damage to VIP's registered mark that their
22 unlawful acts have caused; and providing such other equitable relief as would be reasonable
23 to prevent further violations of VIP's rights.

24 21. As to those unlawful acts that involved the use of a counterfeit mark or
25 designation, VIP is at a minimum entitled to recover statutory damages pursuant to 15 U.S.C.
26

1 § 1117(c)(1) and, because Defendants' actions were willful, VIP is entitled to enhanced
2 statutory damages pursuant to 15 U.S.C. § 1117(c)(2).

3 22. This is also an exceptional case that warrants an award of attorney's fees
4 pursuant to 15 U.S.C. § 1117(a).

5 V.

6 **CLAIMS FOR RELIEF**

7 **COUNT I**

8 **FEDERAL TRADEMARK INFRINGEMENT**

9 **(Lanham Act § 32, 15 U.S. C. § 1114(1)(a))**

10 23. VIP realleges and incorporates the allegations set forth in paragraphs 1 through
11 22 above.

12 24. The acts of Defendants complained of herein constitute use in commerce,
13 without the consent of VIP, of reproductions, copies, counterfeits or colorable imitations of
14 VIP's federally registered TUFFY® mark in connection with the sale, offering for sale,
15 distribution or advertising of goods and services in violation of 15 U.S.C. § 1114(1)(a).

16 25. Defendants' use of the mark TUFFY®, or reproductions, counterfeits, copies, or
17 colorable imitations thereof, on or in connection with goods and services in the manner
18 described above is likely to cause confusion, to cause mistake, or to deceive.

19 26. On information and belief, Defendants' acts complained of herein have been
20 deliberate, willful, and intentional, with full knowledge and in conscious disregard of VIP's
21 rights in their marks and with intent to trade on VIP's goodwill in its mark. On information
22 and belief, as to the counterfeit marks and designations, Defendants intentionally used the
23 infringing marks or designations, knowing that such mark or designation was counterfeit, in
24 connection with the sale, offer for sale or distribution of goods or services.

25 27. As to those unlawful acts that involved the use of counterfeit marks or
26 designations, VIP is entitled to recover three times VIP's damages or three times Defendants'

1 profits, whichever is greater, together with reasonable attorney's fees and prejudgment
2 interest on the amount awarded from the date of service of this complaint, pursuant to 15
3 U.S.C. § 1117(b).

4 28. As a result of the foregoing actions of Defendants, Defendants have been
5 unjustly enriched and VIP has been injured and damaged and is entitled to monetary and other
6 relief as alleged above. In addition, unless Defendants are enjoined as alleged above, VIP
7 will continue to suffer irreparable injury and damage for which there is no adequate remedy at
8 law.

9 **COUNT II**

10 **FEDERAL UNFAIR COMPETITION, FALSE DESIGNATION OF ORIGIN**

11 **(Lanham Act § 43(a)(1)(A-B), 15 U.S. C. § 1125(a)(1) (A-B)**

12 29. VIP realleges and incorporates the allegations set forth in paragraphs 1 through
13 28 herein.

14 30. Defendants' unauthorized use of names, words, terms, symbols or marks
15 confusingly similar to VIP's registered TUFFY® mark (alone or in combination), false
16 designations of origin and false or misleading descriptions or representations of fact, in
17 commerce in connection with goods or services, falsely indicates that Defendants and their
18 products and services are connected with, sponsored by, approved by, affiliated or associated
19 with, or related to VIP.

20 31. Defendants' unauthorized use of names, words, terms, symbols or marks
21 confusingly similar to VIP's registered TUFFY® mark (alone or in combination), false
22 designations of origin and false or misleading descriptions or representations of fact, in
23 commerce in connection with goods or services, misrepresented the nature, qualities and
24 characteristics of Defendants' goods, services or commercial activity, and/or VIP's products,
25 in commercial advertising or promotion.

1 3. An accounting be directed to determine Defendants' profits resulting from their
2 activities and that such profits be paid to VIP and increased as the Court finds to be just under
3 the circumstances of this case.

4 4. Defendants, and each of them, be required to pay to Plaintiff:

5 (a) in accordance with Section 35 of the Lanham Act, 15 U.S.C. § 1117(a)
6 and (b), an award of treble VIP's actual damages and Defendants' profits, together with
7 profits resulting from sales by Defendants relating to their aforesaid trademark infringement
8 and unfair competition;

9 (b) in accordance with Section 35(c) of the Lanham Act, 15 U.S.C. §
10 1117(c) statutory damages for Defendants' use of a counterfeit mark;

11 (c) VIP's attorneys' fees and costs of this action pursuant to 15 U.S.C. §
12 1117;

13 (d) Prejudgment interest pursuant to 15 U.S.C. § 1117(b).

14 5. Defendants, in accordance with Section 34(a) of the Lanham Act, 15 U.S.C. §
15 1116(a), be required to file with the Court, and serve upon VIP, within thirty (30) days after
16 the entry and service of Defendants of an injunction, a report in writing and under oath,
17 setting forth in detail the manner and form in which Defendants have complied with the terms
18 of such injunction.

19 6. VIP recovers such other relief as the Court may deem appropriate.

20 **VIII.**

21 **JURY DEMAND**

22 VIP demands a trial by jury on all claims so triable.

1 **RESPECTFULLY SUBMITTED** this 18th day of February, 2011.

2 **MARISCAL, WEEKS, McINTYRE**
3 **& FRIEDLANDER, P.A.**

4 By: s/ David G. Bray

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